a

RE: ESTATE OF YONG WAI MAN; EX PARTE: YONG KHAI MIN

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[ORIGINATING SUMMONS NO. 6 OF 1988]
9 SEPTEMBER 1994

b

LAW OF TRUSTS : Administration of estate - Duties and powers of guardian of infant beneficiaries - Whether guardian also a trustee - Investment of estate money - Whether leave of Court required to invest estate money - Investment in non-approved unit trust fund - Whether permissible - Consideration of s. 15 of Guardianship of Infants Ordinance (Cap 54) Sabah - Application of Trustee Act 1949, ss. 4, 5 & 59 - Conflict between Ordinance and Act - Which prevails - Federal Constitution, Articles 75, 162(1) & (6).

c

LAW OF TRUSTS : Administration of estate - Infant beneficiaries - Rights of guardian over property - Right to invest - Whether placing money with a bank amounts to parting with possession of property of infants - Guardianship of Infants Ordinance (Cap 54) (Sabah), s. 15(1).

d

This was an application by the administrator of the deceased's estate to re-invest the money of the estate, which money was held in trust for three infant beneficiaries. The administrator sought to invest a certain portion of the money in a unit trust fund known as MBF First Fund, and the balance to be put in a financial institution that offers the highest interest rate to meet the living and education expenses of the beneficiaries.

e

In deciding the application, the Court considered the duties and powers of an administrator, in the context of what an administrator could do with the assets of an estate with infant beneficiaries.

Held:

[1] Section 102 of the Probate and Administration Ordinance (Cap. 109) appears
f to imply that cash in hand forming the whole of the residue estate, of which the minors are the beneficiaries, should not be handed over to the minor beneficiaries although there does not appear to be any provision in the Ordinance governing the minor beneficiary of an intestate. However, s. 17(1) of the Guardianship of Infants Ordinance (Cap. 54) (Sabah) (the Guardianship Ordinance), has limited a guardian's power to utilise the income, even for the maintenance and education of the infant,
g except with the permission of the Court.

[2] Section 15 of the Guardianship Ordinance disallows the sale, mortgage, exchange or parting with possession of the movable or immovable property of the infant without the leave of the Court. By placing money with a bank, the property in the money passes to the bank with the result that the money becomes a debt
h owing by the bank to the depositor. This amounts to a parting with possession of the movable property within the meaning of s. 15 and is prohibited unless permitted by the Court.

[3] A guardian holding the property of an infant is a trustee holding the property under an implied trust for the infant. The Trustee Act 1949 (the Act) applies to an implied trust which arises as soon as the guardian comes into possession of
i property belonging to an infant and in the circumstances, the guardian of the property of an infant can be regarded as a trustee within the meaning of the Act and attracts the application of the Act.

[4] By virtue of Article 75 read with Articles 162(1)&(6) of the Federal Constitution, the provisions of the Act prevail over the Guardianship Ordinance. It follows that a guardian who is to be regarded as a trustee under the Act need not, notwithstanding s. 15(1) of the Guardianship Ordinance, obtain the leave of the Court before investing the money or property of the infant in any of the investments the Act allows. Similarly, the Act prevails over the provisions of s. 17(1) of the Guardianship Ordinance.

[5] The administrator in this case is also a guardian as well as a trustee. Since he is a trustee he should be guided by the Trustee Act 1949, subject to whatever terms the Court or Judge may have imposed.

[6] Insofar as the application to invest in MBF First Fund is concerned, the Court is disinclined to exercise its discretion under s. 59 of the Act to permit the investment. MBF First Fund, although a unit trust fund, does not qualify as an approved investment under s. 5(3) of the Act which requires the company, *inter alia*, to have been paying dividend for the past five years.

[Orders accordingly].

Cases referred to:

Majlis Peguam Malaysia & 3 Ors v. Joseph Au Kong Weng [1993] 1 AMR 26:1103 / [1993] 2 CLJ 417 ***(refd)***

PP v. Tan Kah Pin, [1993] 1 CLJ 83 ***(refd)***

Noel Kenneth Davidson v. Firm Corporation Sdn. Bhd. [1994] 1 AMR 16:862; [1994] 2 CLJ 637; [1994] 2 MLJ 40 ***(foll)***

Legislation referred to:

Guardianship of Infants Ordinance [Cap.54.] (Sabah) ss. 3, 4, 8, 15, 15(1), 17(1), 19,
Intestate Succession Ordinance (No.1 of 1960)
Probate and Administration Ordinance (Cap.109) ss. 3, 14, 94, 94(3), 101-105, 123, 129
Trustee Act 1949, ss. 2, 2(1), 3, 5(3), 6, 36, 59
Federal Constitution, Articles 75, 162(1), (6)

For the administrator - Edwin Tsen; M/s. Tan Pang Tsen & Co.

JUDGMENT

Ian H.C. Chin J:

This is an application by Yong Khai Min, the administrator of the estate of Yong Wai Man, deceased ("the administrator"), for the money of the said estate which had been held in trust for three minor beneficiaries, namely YONG MUI POH, YONG VUN BING and YONG VUN SING, ("the infants") to be re-invested. The net asset of the estate consists of cash in the sum of RM375,435.87 as at 20 November 1986, the date of death. The Court had on 15 June 1988 made the following order. *viz.*:

1. The applicant be excluded from becoming one of the beneficiaries pursuant to s. 61 of the Probate and Administration Ordinance Cap 109 of the Laws of Sabah;
2. The applicant may retain the sum of RM6,000 as out of pocket expenses from the estate;
3. The balance thereof be deposited in the Hongkong & Shanghai Banking Corporation in the name of the applicant on trust for the beneficiaries with

liberty to apply and withdraw to the extent of RM1,000 only per month commencing from June 1988 with liberty to re-apply; and

4. To distribute the remaining balance of the estate to the following beneficiaries upon them attaining the age of 18 in equal share, namely:

(a) YONG MUI POH	-	one-third (1/3) share
(b) YONG VUN BING	-	one-third (1/3) share
(c) YONG VUN SING	-	one-third (1/3) share

The administrator in his affidavit sworn on 2 February 1994 asserts that it is no longer possible to maintain the infants with the sum of RM1,000 per month, provided for in the order of the Court, *supra*. He also asserts that the he has not yet been disbursed the sum of RM6,000 which the Court had ordered. The money of the estate remaining on 3 January 1994 is the sum of RM308,170.49 which is with the Hongkong & Shanghai Banking Corporation (as it was then known), Tawau branch. The administrator is praying for an order:

(1) that a sum sufficient to disburse the administrator of the said RM6,000 and legal fees totalling RM4,538;
(2) that a sum equivalent to half of the balance of the money be placed in a fixed deposit on a 12 monthly basis with MBf Finance Berhad or any other financial institution; and
(3) that the remainder of the money be placed in a savings account with MBf Finance Berhad or any other financial institution but with "no limit to be placed on the spending" for the benefit of the infants;

At the hearing on 11 April 1994, I proffer the off the cuff remark that the money of the estate has not grown since 1988 and that therefore, putting the money in a bank in the manner proposed may not be in the interest of the infants. I referred Mr. Edwin Tsen, Counsel for the administrator, to the Trustee Act, 1949, and to the various unit trust fund that are available in the market and asked him to seek professional advice relating to the investment of the money of the estate. The matter was adjourned for Mr. Edwin Tsen to put in a written submission which he did and he made the following propositions:

(1) a sum of RM200,000 be invested in MBF First Fund or such other unit trust as the administrator deems fit with power to sell and reinvest from time to time; and
(2) the remaining balance be put in a financial institution that offers the highest interest rate to earn deposits to meet the living and education expenses of the beneficiaries.

All this while, the thinking of the Court had been that the best and the safest investment is to place the money with the financial institutions to earn interest. It may very well be true then but the financial system in the country had progressed so much in this decade that opportunities abound for money to be earned, including opportunities for investment. It is with this fact in mind that I had made the said off the cuff remark about the unsuitability of just putting the money in the bank. But there are limitations as to what an administrator can do with the assets of an estate. What then are the duties and powers of an administrator? It is to the relevant legislation that I will now turn. In Sabah, the governing ordinance which came into force on 16 June 1947 is the **Probate and Administration Ordinance** (Cap. 109) ("the Ordinance") where the duties and

powers of an administrator are defined. As for an administrator, his rights relate back from the date of the grant of letters of administration to the date of death of the deceased. This is what s. 14 of the Ordinance says : "14. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death." All properties of the deceased vest in the administrator (see s. 3 of the Ordinance). As for powers, these are generally conferred by s. 94 of the Ordinance which says:

Chapter VII.

94.(1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under s. 3.

(2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveaable property specified in the order in a manner permitted by the order.

(3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,

(a) mortgage, charge, or transfer by sale, gift, exchange, or otherwise any immoveable property for the time being vested in him under s. 3, or

(b) lease any such property for a term exceeding five years.

(4) A disposal of property by an executor or administrator in contravention of subsection (2) or subsection (3), as the case may be, is voidable at the instance of any other person interested in the property.

(5) ...

(6) ...

Save for the restriction in s. 94(3) of the Ordinance in relation to dealing with immoveable property, an administrator appears to have unlimited powers in dealing with the properties of the estate of a deceased. However, this seemingly wide power is circumscribed by the duties which the following sections of the Ordinance impose upon an administrator, viz.:

Chapter IX

The Duties Of An Executor Or Administrator

101. (1) An executor or administrator shall --

(a) within six months from the grant of probate or letters of administration or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the creditors, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and

(b) in like manner within one year from the grant, or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, shewing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The Chief Justice may prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under s. 176 of the Penal Code.

102. The executor or administrator shall with all reasonable expedition and diligence collect the property of the deceased and the debts due to him and shall pay all debts due by the deceased's estate and the legacies under the will (if any), in accordance with the provisions hereinafter contained, and shall forthwith proceed, when there is no minority or other special reason to the contrary, to hand over the residue of the estate (if any), to the person or persons entitled thereto and to make his final report to the Court setting forth the manner in which he has discharged his duties.

103. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all other debts.

104. Testamentary and administration expenses, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate are to be paid next after the funeral expenses and death-bed charges.

105. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan, clerk or domestic servant are next to be paid, and then the other debts of the deceased according to their respective priorities (if any).

By the just quoted provisions, the administrator must from the assets of the deceased pay off his debts and in the priorities spelt out after which the administrator is to hand over the residue of the estate to the beneficiaries. The beneficiaries in the case of an intestate are those persons stipulated by the **Intestate Succession Ordinance** (No. 1 of 1960) (Sabah), which need not detain our attention any further other than noting that the infants in this case are the beneficiaries under the said Intestate Succession Ordinance. Where the beneficiaries are minors, s. 102 of the Ordinance, supra, appears to make an exception regarding the immediate handing over of the residue of the estate to the minor beneficiaries. What then should the administrator do with the cash in hand forming the whole of the residue estate, of which the minors are the beneficiaries? Section 102 of the Ordinance appears to imply that they should not be handed over to the minor beneficiaries. There does not appear to be any provision in the Ordinance governing the minor beneficiary of an intestate though s. 129 of the Ordinance makes provision for such minor beneficiary in the case of probate or an administration with the will annexed. Section 129 together with the attending sections of the Ordinance are reproduced here:

Chapter XII

Investment Of Funds To Provide For Legacies.

123. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities, as the Chief Justice, may by notification in the Gazette prescribe, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

[124-128]

129. (1) Where a legatee entitled by the terms of the bequest to the immediate payment or possession of the money or thing bequeathed is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court at the place where the probate was, or letters of administration with the will annexed were, granted to the account of the legatee and such payment into Court shall be a sufficient discharge of the money so paid.

(2) Such money, when paid in, shall be invested in any of the securities prescribed under s. 123, which securities, with the interest thereon, shall be transferred to the person entitled thereto, or otherwise applied for his benefit as the Court may direct.

Since the answer does not present itself in the Ordinance, I will now turn to the **Guardianship of Infants Ordinance** [Cap.54.] (Sabah) which applies by virtue of the fact that the administrator in this case is, at least he claimed he is, also the guardian of the infants. The parents are under the law the lawful guardian but, under s. 8 of the Guardianship of Infants Ordinance [Cap.54.] (Sabah) -

If both parents of an infant have died without appointing a testamentary guardian, the Court or a Judge may appoint a guardian of the infant's person and property or either of them.

Various duties and limitations are also placed on the guardian appointed by the Court and these are found in the following sections of the Guardianship of Infants Ordinance [Cap.54.] (Sabah), viz.:

3. The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

4. The guardian of the property of an infant shall have the control and management of the infant's property, and shall deal therewith as carefully as a man of ordinary prudence would deal with his own property, and may, subject to this Ordinance, do all acts which are reasonable and proper for the realisation or protection of the infant's property.

14.(1) Where a person appointed by the Court is the guardian of an infant's property, he shall, unless the Judge otherwise orders, give security in such sum as may be appointed for the due performance of his duties as such guardian.

15.(1) A guardian of the property of an infant shall not, without the leave of the Court or a Judge --

(a) sell, mortgage, exchange, or otherwise part with the possession of any of the movable or immovable property of the infant; or

(b) lease any land belonging to the infant for a term exceeding one year.

(2) Any disposal of an infant's property in contravention of this section may be declared void, and on such declaration the Judge may make such order as appears requisite for restoring to the infant's estate the property so disposed of.

(3) The Court or a Judge shall not make any order under sub-section (1) unless it is necessary or advisable in the interests of the infant.

16. A guardian of the property of an infant shall not, unless in any case the Court or Judge otherwise orders, be empowered to give a good discharge for any legacy or other capital monies payable or receivable by an infant.

17.(1) A guardian of the property of an infant may make reasonable provision out of the income of such property for his maintenance and education, having regard to his station in life; but no sum exceeding one hundred dollars per month may be so applied without leave of the Court or a Judge.

(2) Where the income of the infant's property in the hands of the guardian is insufficient for such purpose, or money is required for the infant's advancement, a Judge may order that provision for such purpose be made out of the capital of the infant's property, and for such purpose may authorise the sale, mortgage, transfer or charge of any part of the infant's property, and give such directions in regard thereto as may be necessary in the interests of the infant.

18.(1) If it appears that, having regard to the station in life of an infant and to the value of his property and to all the circumstances of the case, it would be expedient that the capital property of the infant should be made available for his maintenance, education or advancement in such manner as to avoid the expense of applications to the Court, a Judge may instead of appointing a guardian of the property of the infant order that all the property of the infant of whatsoever description shall be placed in the hands of a person to be appointed by the Judge, with full power to deal with and apply the same for the purpose aforesaid in his sole and uncontrolled discretion: and in such case the receipt of such person so appointed shall be a good discharge to any person making any payment or transfer of any property to him on behalf of the infant.

(2) Any person so appointed may be ordered by the Court or Judge to render an account of his dealings with the infant's estate.

(3) The Court or a Judge may for any sufficient reason discharge any order or revoke any appointment, made under subsection (1), and may appoint another person with the same power or such greater or less power as may appear advisable, or may appoint a guardian of the infant's property.

19. Any guardian may apply to a Judge for his opinion, advice or direction on any question respecting the management or administration of the infant's property.

It is clear that because of the limit of "one hundred dollars per month" set by s. 17(1), the guardian has limited power to utilise the income even for the maintenance and education of the infant except with the permission of the Court. But "one hundred dollars per month" was a pretty large sum on 21 December 1946, the date of coming into force of the Guardianship of Infants Ordinance [Cap.54.] (Sabah). Unfortunately, the law has not been amended to keep up with time. Apart from the limitation as to the disposal of the income in the said s. 17(1), s. 15 also disallows the sale, mortgage, exchange or parting with possession of the movable or immovable property of the infant without the leave of the Court or Judge. This brings me to the question of whether placing money in a bank to earn interest can be equated with parting with possession of the money which is prohibited by s. 15. This is turn depends on what was the meaning of the words which the draftsman had used (as opposed to ascertaining what the draftsman meant to say). See *Majlis Peguam Malaysia & 3 Ors v. Joseph Au Kong Weng* [1993] 1 AMR 26:1103, at pp. 1112 to 1113. I would also like to add what was said in the unreported case of *PP v. Tan Kah Pin* [1993] 1 CLJ 83 *viz*.:

The functions of the court is simply to ascertain the meaning of the Act as is stands. See the judgment of Lord Loreburn C in *A-G & Board of Education v. West Riding of Yorkshire, Ex p Grenside* [1907] AC 29. If the words of statute are plain, you give effect to them (per Lord Coleridge CJ in *R v. Mansel Jones* [1889] 23 QBD 29. I would also quote from the case of *Woodward v. Watts* [1853] 2 E & B 452 -

> 'The golden rule in the construction of an Act of Parliament is to put on the words of it their natural and grammatical construction although that may lead to some inconvenience, absurdity, or mischief; it being for the judges to construe Act of Parliament, and not to legislate, and for the legislature to provide a remedy when one is wanted.'

The court has no authority to limit a statute or put upon the words of a statute a limitation which is not according to the ordinary meaning of the words. See *Re Norman* [1886] 16 QBD 673. One final principle of law which is relevant is that as far as possible a statute should not be read to give it an effect such that it is a pointless piece of legislation. See *Smith Kline & French Laboratories Ltd. v. Salim (Malaysia) Sdn. Bhd.* [1989] 2 MLJ 380, at p. 382.

To summarise, all that the court has to do is to consider what is the plain meaning of the words of the statute...

I am of the view that placing money in a bank to earn interest amounts to a parting with possession of the movable property which, unless permitted by the Court or Judge, is prohibited by s. 15. By placing the money with a bank, the property in the money passes to the bank with the result that the money becomes a debt owing by the bank to the depositor. See *Noel Kenneth Davidson v. Firm Corporation Sdn. Bhd.* [1994] 1 AMR 16:862; [1994] 2 CLJ 637; [1994] 2 MLJ 40. If the property in the money passes, it surely amounts to a parting with possession of the movable property within the meaning of s. 15. More so in the case of the money being invested in securities. It would be advisable for a guardian, as soon as he comes into possession of property belonging to the infant to seek the guidance of the Court under s. 19. There is also one other legislation which is relevant and that is the **Trustee Act, 1949**, ("the Act") which applies throughout the nation from the 30 June 1965. The Act applies to trusts including executorships and administratorships (see s. 2) and it contains extensive provisions regarding the powers of a trustee. Can a guardian appointed under the Guardianship of Infants Ordinance [Cap.54.] (Sabah) be regarded as a trustee within the meaning of, and thus exercise the powers given by, the Act? The Act has been expressed (see s. 2(1)) to apply to "trusts" and "trust" has been defined (see s. 3) to include implied and constructive trusts. A guardian holding the property of the infant is surely a trustee holding the property under an implied trust which arises as soon as the guardian comes into possession of property belonging to an infant; thus, the guardian of the property of an infant can be regarded as a trustee within the meaning of the Act and attracts the application of the Act. The Act confers upon a trustee the following powers, viz.:

Trustee Act, 1949.

Part II
Investment

4. Authorized investments.

(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following --

(a) in any of the securities of the Federal Government or the Government of the State of Sabah or State of Sarawak or of the Republic of Singapore;

(b) in any securities the interest on which is or shall be guaranteed by Parliament or by the Federal Government;

(c) in or upon titles to immovable property in Malaysia, such titles being freehold titles or grants in perpetuity or leases (other than mining leases) for a term whereof sixty years at least is unexpired at the time of such investment;

Provided that --

(i) the land to which any such title relates shall be situate within limits of any City, Municipality, Town Council or Town Board area; and

(ii) there be erected on the land to which such title relates houses or other buildings the gross rental whereof, together with the land appurtenant thereto, is at the time of such investment not less than seven per centum of the purchase price of the land, in the case of a purchase price, or of the value of such land, as ascertained under s. 12(1)(a) in the case of a charge.

(d) in fixed interest securities issued in Malaysia with the approval of the Treasury by any public authority established under federal or State law;

(e) in loans to an approved company;

(f) in loans the principal and interest on which is or shall be guaranteed by the Federal Government;

and may from time to time vary such investment as aforesaid.

(2) No trust funds shall be invested under subsection (1) and (e) unless --

(a) the paid up ordinary share capital of the approved company is not less than five million ringgit; and

(b) the approved company has paid a dividend at the rate of not less than five per centum upon such ordinary share capital during each of the last three years prior to the time of investment, and where the approved company is a company which has acquired the assets and liabilities of another approved company, payment of a dividend by that company during each of the last three years prior to the time of such acquisition shall be treated as payment by the approved company; and

(c) the total amount of the borrowings of the approved company from all sources, whether trustee or not, accepted by the approved company on loan and deposit, and including interest due thereon and not repaid by the approved company, does not at any time exceed two-thirds of the amount, excluding prospective interest, for the time being secured to the approved company from its borrowers.

(3) ...

5. Further powers of investment of trustees.

(1) The investments specified in section shall include any security to which this section applies and any units, or any shares of the investments, subject to the trust, of a unit trust scheme approved by the Yang di-Pertuan Agong by notification published in the Gazette.

(2) Subject to this section, this section applies to any securities issued by a company (whether incorporated in Malaysia or elsewhere) prices for which are quoted on the Stock Exchange of Malaysia

(3) This section does not apply to securities of any company unless --

(a) the total issued and paid-up share capital of the company is, or if converted into ringgit from a currency other than ringgit is, five million ringgit or more; and

(b) the company has in each of the five years immediately preceding the calendar year in which the investment is made paid a dividend on all the shares issued by the company, excluding any shares issued after the dividend was declared and any shares which by their terms of issue did not rank for the dividend for that year,

and the rate of exchange in relation to the conversation of issued and paid-up share capital shall be that certified by a bank manager, as defined in s. 6(3)(b), to be appropriate on the day a trustee exercise his power to invest in such securities.

(4) ...
(5) ...
(6) ...

There are also provisions in the Act for the trustee to seek proper advice with regards to the investment (see s. 6). This brings me to the next question of whether a guardian who is regarded as a trustee under the Act needs permission of the Court or Judge under s. 15(1) of the Guardianship of Infants Ordinance [Cap.54.] (Sabah) and the Act. The conflict also extends to the powers to apply the income for the maintenance and education of an infant, under the Act which I will advert to later. I am of the view the Act prevails by virtue of Articles 75 read with Articles 162(1) and (6) of the Constitution, viz.:

75. Inconsistencies between federal and State laws.
If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

162. Existing laws.
(1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modification as may be made therein under this Article and subject to any amendments made by Federal or State law.
(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

If is within the competency of Parliament to pass and extend the Act to Sabah since the subject-matter of the Act falls within the Federal List of the Constitution. It follows that a guardian who is to be regarded as a trustee under the Act need not, notwithstanding s. 15(1) of the Guardianship of Infants Ordinance [Cap.54.] (Sabah), obtain the leave of the Court or Judge before investing the money or property of the infant in any of the investments the Act allows. When then of the "one hundred dollars per month" limit set by s. 17(1) of the Guardianship of Infants Ordinance [Cap.54.] (Sabah), *supra*. Again I am of the view, for the reasons I have already set out, the Act prevails. The Act gives very wide powers to a trustee to apply the income towards maintenance of an infant. One of such provision is s. 36 of the Act which says:

36. **Power to apply income for maintenance and to accumulate surplus income during a minority.**

(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property --

(a) during the minority of any such person, if his interests so long continues, the trustees may, at their sole discretion, pay to his parents or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, the whole of such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is --

(i) any other fund applicable to the same purpose; or

(ii) any person bound by law to provide for his maintenance or education; and

(b) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustee shall thenceforth pay the income of that property and of any accretion thereto under subs-section (2) to him, until he either attains a vested interest therein or dies, or until failure of his interest:

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the minor and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purpose; and where trustee have notice that the income of more than one fund is applicable for those purposes, then so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the Court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

(2) During the minority of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorized investments, and shall hold those accumulations as follows:

(a) if any such person -

(i) attains the age of twenty-one years, or marries under that age, and his interest in such income during his minority or until his marriage is vested interest; or

(ii) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which the income arose the trustee shall hold the accumulations in trust for the person absolutely, and that the receipt of such person after marriage, and though still a minor, shall be a good discharge; and

(b) in any other case the trustee shall, notwithstanding that the person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes,

but the trustee may, at any time during the minority of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five ringgit per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the minority of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely

The administrator in this case is also a guardian as well as a trustee. Since he is a trustee he should be guided by the Act subject to whatever terms the Court or Judge may have imposed. I must point out here that I have not set out all the relevant provisions of the Act and a trustee is well advised to go through the Act thoroughly. As for the question of guardianship, there is no record to say that the administrator had been appointed a guardian but since he has acted as one for so many years now, I, by virtue of the powers conferred on me by s. 8 of the Guardianship of Infants Ordinance [Cap.54.] (Sabah), hereby appoint the administrator YONG KHAI MIN the guardian of the infants' persons and properties. The time will come when the infants will need travel documents which the administrator can only apply for if he is legally constituted the guardian which I have just done. For the avoidance of doubt, the administrator is now to regard himself as guardian of the infants' persons and properties as well as being a trustee of the infants' properties and he is to comply with the provisions of the Act as regards the investment of the properties of the infants and the application of the moneys for the benefit of the infants. The administrator YONG KHAI MIN shall in every twelve months cause to be prepared a statement of account relating to the properties of the infants and lodge the same with the High Court at Tawau together with all supporting receipts, invoices and other relevant documents. As for monies of the infants now with the Hongkong & Shanghai Banking Corporation (as it was then known), Tawau branch, the administrator YONG KHAI MIN shall be allowed to take the monies out for the purpose of dealing with the same in accordance with the provisions of the Act. I finally order that the administrator be paid out of the moneys the various sums which I have referred to at the outset and claimed by the administrator.

I have not acceded to the application that I exercise my discretion under s. 59 of the Act to permit the administrator to invest in the MBF First Fund, a unit trust fund, which only operated from 2 May 1991 and therefore does not qualify as an approved investment under s. 5(3) of the Act which requires the company, *inter alia*, to have been paying dividend for the past 5 years. The proposed investment does not appear to have the support of any advice of a stock broker obtained through the trustee's bank manager nor the advice of an authorized accountant as required by s. 6 of the Act since no such advice had been adverted to or their opinion exhibited. There are, to my knowledge, other units trust funds which qualify. I would impress upon the administrator that he should obtain proper advice as required by the Act before the investments can be safely made and be always guided by the provisions of the Act.